

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re the Application of:) Group Art Unit: 3751
BALL) Examiner: Robert M. Fetsuga
Serial No.: 10/732,726) Confirmation No.: 2017
Filed: December 10, 2003) Appeal No.: 2007-0769
Atty. File No.: 5564-152) REPLY BRIEF
For: *"Method and Apparatus for
Assembling and Sealing Bathtub
Overflow and Waste Water Ports"*) *Electronically Filed*

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Appellant submits this Reply Brief pursuant to 37 CFR §§ 41.39(b)(2) & 41.41 in response to a Supplemental Examiner's Answer dated June 2, 2008. No fees or extensions of time are believed due for this submission since it is being filed prior to the two-month period of reply of August 2, 2008. The Commissioner, however, is authorized to debit Deposit Account 19-1970 if required.

Withdrawal of the new grounds of rejection is requested in view of the arguments provided herein.

Status of the Claims begin on page 2 of this paper;

Grounds of the Rejection to be Reviewed on Appeal begin on page 3 of this paper; and

Arguments begin on page 4 of this paper.

STATUS OF THE CLAIMS

Presently, Claims 1, 5-8 and 10 are pending in the instant application. Claims 7 and 8 have been withdrawn. In a Decision dated October 17, 2007, the BPAI affirmed the Examiner's rejection of Claims 1, 5 and 6. The BPAI, however, reversed the Examiner's rejection of Claim 10. Claim 10 has been rejected under new grounds in a Supplemental Examiner's Answer dated January 30, 2008. The new grounds of rejection of the same Claim 10 previously considered by the Board is now the subject of the present Appeal.

GROUNDS OF THE REJECTION TO BE REVIEWED ON APPEAL

The Examiner has rejected Claim 10 under 35 U.S.C. §103(a) as being unpatentable over a combination of three references: U.S. Patent Publication No. 2002/0032926 to Lewis ("Lewis"), U.S. Patent No. 5,890,241 to Ball ("Ball") and U.S. Patent No. 6,618,875 to Oropallo et al. ("Oropallo").

ARGUMENTS

Introduction

On October 17, 2007, the Board of Patent Appeals and Interferences (“the Board”) reversed the Examiner’s holding that Claim 10 was obvious in view of a combination of Lewis, Fritz, and Oropallo. As a result, the application was remanded to the Examiner for further consideration of the prior art, specifically whether the combination of Ball with Lewis, Fritz and Oropallo render the subject matter of Claim 10 obvious. The Examiner issued a Supplemental Examiner’s Answer on January 30, 2008 wherein Claim 10 was rejected as being obvious under new grounds - a combination of Lewis, Ball and Oropallo. More specifically, the Examiner asserted that Lewis disclosed a majority of the claim limitations "except for the overflow fitting including a diaphragm and cap." Oropallo was cited for employing the claimed combination of a nut and a cap and Ball was cited for the notion of providing a diaphragm.

Claim 10 reads:

10. A method for conducting a fluid leakage test on a fluid system comprising a bathtub which has a bottom and adjacent side and end wall, and an overflow port in an end wall, and with the overflow port being in communication with a primary drain system steps comprising:

providing a one-piece overflow fitting having an overflow pipe with an upper end portion and a lower end portion, the upper end portion having an outer end defining an inlet being adapted to fit through the bathtub overflow port;

providing threads on an outer surface of the upper end portion and surrounding the inlet and normally extending through the bathtub overflow port;

providing a lip extending radially outwardly from an outer surface of the overflow pipe between the elbow portion and the upper end portion and being spaced from the inlet to engage an outer surface of the bathtub end wall around the bathtub overflow port;

sealing a thin diaphragm to the outer end of the upper end portion to close the inlet to fluid flow;

opening the diaphragm to permit the flow of fluid through the overflow port;

threading a nut element compatible with the threads wherein the nut element has a threaded portion for threadably mounting the nut to the upper end portion to clamp the overflow fitting to the end of the bathtub between the lip and the nut element, and at least one lug extending radially from the nut; and

detachably engaging a cap to the lug to cover the nut.

In a Reply Brief dated March 17, 2008 the Appellant noted that Oropallo did not qualify as prior art under 35 U.S.C. §102 and thus, could not be combined with Ball and Lewis under 35 U.S.C. §103. More specifically, review of the official file history shows that the above-identified application (the “‘726 application”) is a Continuation-In-Part of U.S. Patent Application Serial No. 09/954,420, filed September 17, 2001, now U.S. Patent No. 6,691,411 (the “‘420 application”) and Serial No. 10/229,533, filed August 28, 2002, now U.S. Patent No. 6,675,406 (the “‘533 application”), the latter being a Continuation of abandoned U.S. Patent Application No. 09/593,724, filed June 13, 2000 (“the ‘724 application”). Therefore, subject matter of the ‘726 application that was disclosed in the ‘724 application enjoys a priority date of **June 13, 2000**. 37 C.F.R. §1.78. Oropallo was filed March 28, 2002 **nearly two years after** the filing date of the ‘724 application. The cap and nut combination, for which Oropallo was cited as disclosing, was disclosed at least in Fig. 3 of the ‘724 application, and, thus, that combination enjoys the benefit of the June 13, 2000 filing date. Since Oropallo did not qualify as prior art, withdrawal of the new rejection to Claim 10 was requested.

In response to the Reply Brief of March 17, 2008, the Examiner issued a Supplemental Examiner’s Answer dated June 2, 2008, asserting that arguments presented in the Reply Brief were “without merit” since the ‘726 application allegedly did not enjoy the benefit of the ‘724 application. More specifically, the Examiner argued for the first time that the ‘533 application was filed after the expiration of the ‘724 application, thereby breaking the chain of copendencey between the ‘724

application and the ‘533 application. Notably the ‘724 and ‘533 applications were both examined by the same Examiner of the instant application, Examiner Fetsuga. Despite the passage of over eight years from the claimed priority date, the Board’s previous consideration of Claim 10, and the intervening issuance of two related continuation patents also seeking the benefit of the priority date at issue, the Examiner, for the first time, raises a new issue in this appeal concerning the appropriate reliance on a priority filing date. Such an issue could have, and properly should have, been addressed during prosecution, rather than on appeal. In any event, proper application of the USPTO Rules and title 37 of the Code of Federal Regulations shows that the Examiner’s treatment of the priority claim at issue is in error. Appellants respectfully request that the Board find that because the ‘726 application properly enjoys a priority date of June 13, 2000 the §103(a) rejection of Claim 10 is improper and Claim 10 should therefore be allowed.

Copendency of the ‘724 application and the ‘533 application

Review of the prosecution history of the ‘724 application will show that an Appeal Brief (“Appeal Brief 1”) was received by the USPTO on February 1, 2002. Thereafter, on February 28, 2002, a Notification of Non-Compliance with 37 C.F.R. §1.192(c) (“Notification 1”) was issued by the USPTO indicating that Appeal Brief 1 did not comply with the rules. Notification 1 set a one-month deadline to respond, March 28, 2002. On March 28, 2002, a second Appeal Brief (“Appeal Brief 2”) was timely submitted in response to Notification 1. A subsequent Notification (“Notification 2”), which indicated that Appeal Brief 2 was non-responsive to Notification 1, was issued by the USPTO on May 17, 2002. After receiving a second non-compliance notification, the Applicants decided to address the alleged deficiencies of Appeal Brief 2 by filing the ‘533 continuing application, which later issued as U.S. Patent No. 6,675,406.

The ‘533 application was filed on August 28, 2002, six months from the date of Notification 1. Enclosed herewith is Exhibit A, showing the transaction history of the ‘724 application, and Exhibit B, showing the transaction history of the ‘533 application (both obtained from the USPTO’s Patent Application Information Retrieval system). Further, a family tree is provided as Exhibit C that shows the relationship between the ‘724 application, the ‘533 application, the ‘726 application

and various other applications. In the ‘724 application, applicant checked the box authorizing payment of any additional fee required under 37 C.F.R. §§1.116 and 1.117 (Ex. D). Similarly, such box was also checked in the ‘533 application (Ex. E). 37 C.F.R. §1.136(a)(3) states in relevant part:

“An authorization to charge all required fees, fees under § 1.17, or all required extension of time fees will be treated as a constructive petition for an extension of time in any concurrent or future reply requiring a petition for an extension of time under this paragraph for its timely submission.” (Emphasis added).

The ‘533 application, together with its fee authorization, therefore sufficed as a “reply” under the rules to invoke a constructive extension of time.

Such authorization, along with the filing of the ‘533 continuation application, thereby invoked a constructive petition for an extension of time to reply to Notification 1 from March 28, 2002 to the filing date of the ‘533 application, August 28, 2002. Therefore, since the ‘533 application was filed prior to the abandonment of the ‘724 application, the requisite copendency existed in order for the ‘533 application to properly claim domestic priority under 35 U.S.C. §120. Based on this priority date, Oropallo is not an available prior art reference and thus, the Examiner’s §103(a) rejection of Claim 10 is improper.

Title 37 of the Code of Federal Regulations contemplates that the filing of a continuing application is a “reply”. More specifically, 37 C.F.R. §1.137, specifically states that “in a non-provisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application.” 37 C.F.R. §1.137(c) (emphasis added). The ‘533 continuing application addressed the issues set forth in Notifications 1 and 2. Specifically, Applicant filed a preliminary amendment that cancelled original claims 1-9 and added new claims 10-20 in the ‘533 Application in an attempt to overcome the Examiner’s rejection of claims. Furthermore, Applicant’s Preliminary Amendment of the ‘533 Application addressed the obviousness rejection at issue in Appeal Brief 2 and explicitly stated that the claims were placed in “better form,” as compared to

those on appeal. The very purpose of the continuation ‘533 application was to reply to the issues raised in the ‘724 application prosecution.

Further, in Notification 1, the Examiner stated that the term “sealing element” used in Claim 1 was not properly amended. The Examiner stated that “while this issue was removed from consideration by the Amendment filed April 30, 2001 (where the offending claim language was cancelled), the Amendment filed September 5, 2001 reinstated such claimed subject matter”. (Emphasis added). This issue was properly addressed in the Preliminary Amendment that accompanied the ‘533 application. More specifically, the ‘533 application was amended to further describe the sealing element shown in Fig. 4. This description of the drawing provided the required enabling disclosure and was not objected to as adding new matter to the specification.

Finally, in Notification 2, the Examiner stated that Appeal Brief 1 was not fully responsive due in part to minor punctuation issues, i.e. the fact that Claim 1 used a semicolon “;” as opposed to a comma “,”. It is surprising that such a fastidious examiner, despite the passage of numerous years, the issuance of two related patents, etc. could raise for the first time on appeal the major issue of copendency.

Exhibit D, as briefly mentioned above, is a transmittal sheet related to the ‘724 application showing that the proper box was checked giving authorization for the USPTO to charge any fees under §1.16 and §1.17. Exhibit E is a transmittal sheet related to the ‘533 application indicating that all fees deemed necessary but absent at the time of filing may be charged to the Deposit Account. The checked box shown in Exhibit E shows an intent to file a continuation, i.e., an application related to the ‘724 application that met the requirements of copendency, common inventorship and common disclosure.

Appellant respectfully submits that in view of the straightforward nature of the facts and applicable law at issue here, remanding this case to the Examiner is not necessary. Appellant therefore requests that the Board, in the interests of administrative efficiency and in view of the protracted nature of the prosecution of this case to date, simply rule on this matter and find that Appellant is entitled to the early priority date for the present application.

USPTO's Treatment

The USPTO treated the filing of the '533 application as a proper continuation. More specifically, at no time during the pendency of the '533 application did the Examiner, here who is the same Examiner of the above-identified application, indicate that the claim of priority was improper. Patent Examiner's are "very experienced" in performing their duties. Boehringer Ingelheim Vetmedica, Inc. v. Schering-plough Corp., 68 F. Supp. 2d 508, 526(D.N.J. 1999). Examiner Fetsuga has prosecuted over 1400 patent applications, including the '724 application, the '533 application and the '726 application, the latter two seek the priority date at issue. Exhibit C shows that various other related patent applications trace their dependence back to the '724 and the '533 applications. Appellant expended tens of thousands of dollars prosecuting related patent applications that Appellant reasonably believed enjoyed the benefits of an early priority date. The supposed lack of priority should have been addressed, if at all, during prosecution of the '533 application.

Refiling of an Application

Attention is also directed to §1210 of the MPEP which contemplates "refiling" of an application. More specifically, §1210 III states:

"to avoid the rendering of a decision by the Board in applications which applicant has decided to abandon or to refile as continuations, applicant should promptly inform the chief clerk of the Board in writing as soon as they have positively decided to refile or abandon the application obtaining an Appeal awaiting a decision". (Emphasis added.)

In this instance, the applicants of the '724 application decided to abandon an appeal in lieu of the filing of the '533 continuing application, essentially, "refiling" the '724 application with amended claims in "letter form." Again, the USPTO's own rules contemplate that a continuation may be used to remove claims from an appeal and in effect transfer them to a new application. Thus, while the '533 continuation application is deemed a proper "reply" under 37 C.F.R. §1.136, it should

further or alternatively be deemed a refiling of the ‘724 application (e.g. as further demonstrated by the filing of a preliminary amendment that presented “better claims.”).

Petition to Revive

Although the examination above is believed to resolve the issue of whether the ‘533 application enjoys the priority date of June 13, 2000, Appellant reserves the right to file a Petition to Revive for Unintentional Delay the ‘724 application. The facts clearly support that copendency between the ‘533 application and the ‘724 application was undeniably desired, and indeed believed to have been achieved. Appellant is, however, prepared to file, if necessary, a petition to revive the ‘724 application to avoid any question of such intent. More specifically, the Appellant is prepared to submit a Petition for Extension of Time along with a five-month extension fee, thereby extending the abandonment date of the ‘724 application from March 28, 2002 to August 28, 2002. The requisite reply pursuant to 37 C.F.R. §1.137(c) would thus be met by the previous filing of the ‘533 application on August 28, 2002.

Conclusion

For all the foregoing reasons, Appellant believes that Claim 10 is in condition for allowance and such disposition is respectfully requested, without the need for a further remanding to the Examiner. If there are any questions related to this request, the Board is invited to contact the undersigned.

Respectfully submitted,

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Date: July 30, 2008

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09/593,724

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Transaction History

Date	Transaction Description
10-15-2002	Mail Abandonment for Failure to Respond to Office Action
10-15-2002	Abandonment for Failure to Respond to Office Action
05-17-2002	Notice -- Defective Appeal Brief
05-16-2002	Date Forwarded to Examiner
04-10-2002	Defective / Incomplete Appeal Brief Filed
04-10-2002	Appeal Brief Filed
02-28-2002	Notice -- Defective Appeal Brief
02-28-2002	Date Forwarded to Examiner
02-01-2002	Defective / Incomplete Appeal Brief Filed
02-01-2002	Appeal Brief Filed
10-12-2001	Notice of Appeal Filed
02-28-2002	Notice -- Defective Notice of Appeal
02-27-2002	Correspondence Address Change
01-18-2002	Request for Extension of Time - Granted
10-12-2001	Defective/Not Acceptable Notice of Appeal
10-12-2001	Notice of Appeal Filed
10-12-2001	Request for Extension of Time - Granted
09-20-2001	Mail Advisory Action (PTOL - 303)
09-19-2001	Advisory Action (PTOL-303)
09-12-2001	Date Forwarded to Examiner
09-05-2001	Amendment after Final Rejection
06-05-2001	Mail Final Rejection (PTOL - 326)
06-05-2001	Final Rejection
05-05-2001	Date Forwarded to Examiner
04-30-2001	Response after Non-Final Action
04-30-2001	New or Additional Drawing Filed
02-08-2001	Mail Notice of Restarted Response Period
02-08-2001	Letter Restarting Period for Response (i.e. Letter re: References)
02-02-2001	Miscellaneous Incoming Letter
01-26-2001	Mail Non-Final Rejection
01-25-2001	Non-Final Rejection
10-10-2000	Information Disclosure Statement (IDS) Filed
10-10-2000	Information Disclosure Statement (IDS) Filed
09-05-2000	Case Docketed to Examiner in GAU
08-14-2000	Application Dispatched from OIPE
08-14-2000	Correspondence Address Change
07-03-2000	IFW Scan & PACR Auto Security Review
06-13-2000	Initial Exam Team nn

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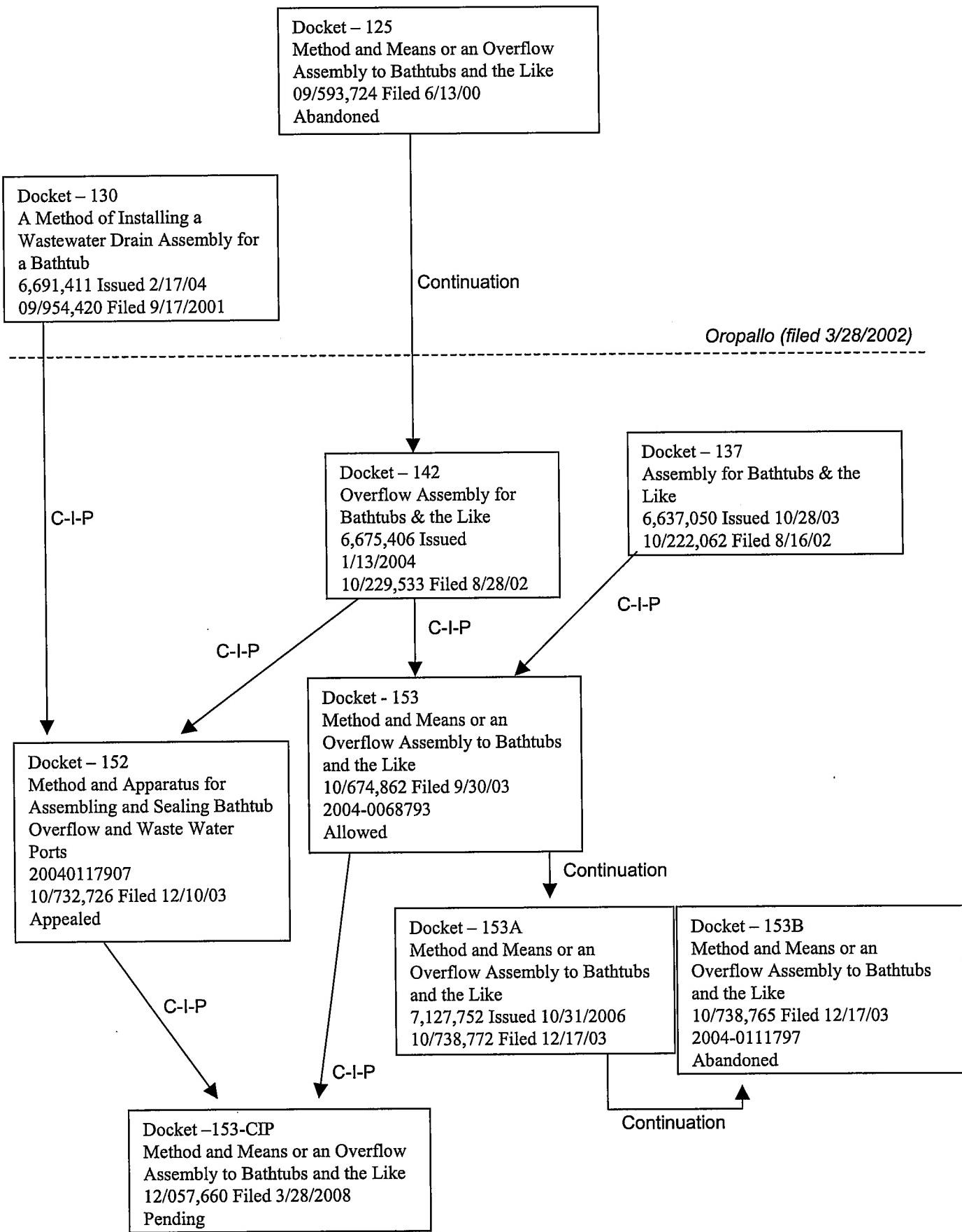
Transaction History

Date	Transaction Description
01-13-2004	Recordation of Patent Grant Mailed
12-23-2003	Issue Notification Mailed
01-13-2004	Patent Issue Date Used in PTA Calculation
12-11-2003	Receipt into Pubs
12-09-2003	Application Is Considered Ready for Issue
10-23-2003	Issue Fee Payment Verified
08-28-2002	Workflow - Drawings Finished
08-28-2002	Workflow - Drawings Matched with File at Contractor
12-02-2003	Receipt into Pubs
12-01-2003	Mail Response to 312 Amendment (PTO-271)
12-01-2003	Response to Amendment under Rule 312
07-21-2003	Amendment after Notice of Allowance (Rule 312)
10-23-2003	Issue Fee Payment Received
09-08-2003	Receipt into Pubs
07-28-2003	Workflow - File Sent to Contractor
07-25-2003	Receipt into Pubs
07-24-2003	Dispatch to Publications
07-24-2003	Dispatch to Publications
07-23-2003	Mail Notice of Allowance
07-23-2003	Notice of Allowance Data Verification Completed
07-14-2003	Incoming Letter Pertaining to the Drawings
07-18-2003	Date Forwarded to Examiner
07-14-2003	Amendment after Final Rejection
04-09-2003	Mail Final Rejection (PTOL - 326)
04-09-2003	Final Rejection
03-03-2003	Incoming Letter Pertaining to the Drawings
03-07-2003	Date Forwarded to Examiner
03-03-2003	Response after Non-Final Action
12-31-2002	Mail Non-Final Rejection
12-27-2002	Non-Final Rejection
10-15-2002	Information Disclosure Statement (IDS) Filed
10-15-2002	Information Disclosure Statement (IDS) Filed
08-28-2002	Information Disclosure Statement (IDS) Filed
08-28-2002	Information Disclosure Statement (IDS) Filed
08-28-2002	Preliminary Amendment
10-17-2002	Case Docketed to Examiner in GAU
09-30-2002	Application Dispatched from OIPE
09-26-2002	Application Is Now Complete
09-05-2002	IFW Scan & PACR Auto Security Review
08-28-2002	Initial Exam Team nn

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See 37 C.F.R. §§ 1.27 and 1.28.

TOTAL AMOUNT OF PAYMENT (\$)

PO4447US0

Complete if Known

Application Number	
Filing Date	
First Named Inventor	William T. Ball
Examiner Name	
Group / Art Unit	
Attorney Docket No.	PO4447US0

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1. The Commissioner is hereby authorized to charge indicated fees and credit any over payments to:

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FEE CALCULATION (continued)

3. ADDITIONAL FEES

Large Entity	Small Entity	Fee Code (\$)	Fee Code (\$)	Fee Description	Fee Paid
105	130	205	65	Surcharge - late filing fee or oath	
127	.50	227	25	Surcharge - late provisional filing fee or cover sheet	
139	130	139	130	Non-English specification	
147	2,520	147	2,520	For filing a request for reexamination	
112	920*	112	920*	Requesting publication of SIR prior to Examiner action	
113	1,840*	113	1,840*	Requesting publication of SIR after Examiner action	
115	110	215	55	Extension for reply within first month	
118	380	218	190	Extension for reply within second month	
117	870	217	435	Extension for reply within third month	
118	1,360	218	680	Extension for reply within fourth month	
128	1,850	228	925	Extension for reply within fifth month	
119	300	219	150	Notice of Appeal	
120	300	220	150	Filing a brief in support of an appeal	
121	260	221	130	Request for oral hearing	
138	1,510	138	1,510	Petition to institute a public use proceeding	
140	110	240	55	Petition to revive - unavoidable	
141	1,210	241	605	Petition to revive - unintentional	
142	1,210	242	605	Utility issue fee (for reissue)	
143	430	243	215	Design issue fee	
144	580	244	280	Plant issue fee	
122	130	122	130	Petitions to the Commissioner	
123	50	123	50	Petitions related to provisional applications	
128	240	128	240	Submission of Information Disclosure Stmt	
581	40	581	40	Recording each patent assignment per property (times number of properties)	
148	780	248	380	Filing a submission after final rejection (37 CFR § 1.126(b))	
149	780	249	380	For each additional invention to be examined (37 CFR § 1.128(b))	

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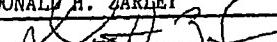
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SUBMITTED BY

Name (Print/Type) DONALD H. ZARLEY

Signature 

Complete (if applicable)

Registration No. (Attorney/Agent) 18,543 Telephone 515-288-3667

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Application Number	
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First Named Inventor	William T. BALL
Examiner Name	R. FETSUGA
Group Art Unit	3751
Attorney Docket No.	P04447US1

METHOD OF PAYMENT

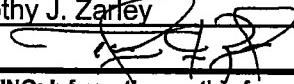
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 Deposit Account Number **50-2098**
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3. ADDITIONAL FEES

Fee Code	Large Entity Fee (\$)	Small Entity Fee (\$)	Fee Description	Fee Paid
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117	920	217	460 Extension for reply within third month	
118	1,440	218	720 Extension for reply within fourth month	
128	1,960	228	980 Extension for reply within fifth month	
119	320	219	160 Notice of Appeal	
120	320	220	160 Filing a brief in support of an appeal	
121	280	221	140 Request for oral hearing	
138	1,510	138	1,510 Petition to institute a public use proceeding	
140	110	240	55 Petition to revive - unavoidable	
141	1,280	241	640 Petition to revive - unintentional	
142	1,280	242	640 Utility issue fee (or reissue)	
143	460	243	230 Design issue fee	
144	620	244	310 Plant issue fee	
122	130	122	130 Petitions to the Commissioner	
123	50	123	50 Processing fee under 37 CFR 1.17(q)	
126	180	126	180 Submission of Information Disclosure Stmt	
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SUBMITTED BY		Complete if applicable		
Name (Print/Type)	Timothy J. Zarley	Registration No. (Attorney/Agent)	45,253	Telephone 515-558-0200
Signature			Date	8-28-02

WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.